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CHAIRBill No. HB 2

STATE OF MONTANA

WHITE PAPER ON OPD MANAGEMENT CHALLENGES

This white paper on challenges OPD management faces is a condensation of paragraphs 19 through 29 of the response adopted by the PDC in June 2012 to the 2009 American University [AU] report and the 2011 ACLU report commenting on the condition of OPD. In summary, 168,290 FTE lawyer-hours, 29,523 investigator-hours, and 81,756 support staff-hours do not give OPD managers sufficient workforce resources to provide effective assistance of counsel for clients in excess of 30,900 new cases per year in 207 courts scattered across the State when, additionally, there are insufficient funds available to pay more costly contract lawyers:

¶19 **Resources and Mission.** The best management will fail without the availability of the resources needed for performing the mission of any private entity or organization or public agency. The primary mission of OPD is providing "effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense." Public defenders [PDs] cannot provide their clients with effective assistance of counsel guaranteed by our Constitutions if OPD management cannot supply the resources required by the PDs for fulfilling their ethical obligations.

¶20 **Workforce-hours.** A vital, essential management resource is the number of productive-hours available from the workforce for client representation, management, administration, and training. The OPD mission cannot be accomplished without the expenditure of workforce-hours.

¶21 **FTE Attorneys.** ... Of the 124.25 attorneys with caseloads, 9 are in the office of the appellate defender, one of which is the chief appellate defender. The appellate attorneys devote their time to appellate work and none to trial work. Not only would doing so potentially create a conflict, their workloads do not permit the luxury. Of the remaining 115.25 FTE attorneys, the PDC has restricted the hours the 11 regional deputy public defenders [RDPDs] and 5.75 managing attorneys can spend representing clients so they have more time for managing, supervision, mentoring, training, and performance evaluations. Thus, OPD depends on 98.5 FTE lawyers devoting full time toward representing clients at the district court and courts of limited jurisdiction levels.

¶22 **221 FTE Staff Lawyer Workdays per Year.** A 2080 work-hour year comes from 260 work days, *i.e.*, 52 weeks times 5 eight hour days. Although paid on the basis of 2,080 hours, expecting that many productive-hours per year from the most efficient lawyer is not realistic when at least 10 holidays, not less than 15 but not more than 24 vacation days, up to 12

sick leave days, and 15 hours of continuing education reduce the work year. Thus, 260 work days shrink to not more than 221 FTE staff lawyer workdays per year.

¶23 147,750 FTE Staff Lawyer-hours. 8.0 productive-hours per day, *i.e.*, representing clients or managing, over 221 days provides 1,768 hours. 1,547 hours comes out of 7.0 productive-hours per day. Seven productive-hours over 221 work days is more realistic, although probably optimistic after OPD training, office meetings, breaks, and other requirements are taken into consideration. Thus, the productive-hours per annum is rounded down to 1,500 to account for lawyers entitled to more than 15 vacation days and the meetings and other requirements. 1,500 hours equates to 6.79 productive-hours on each of the 221 working days. Even that may be hopeful when travel time and time waiting in court are considered. 98.5 FTE lawyers producing 1,500 hours of production gives OPD management 147,750 FTE staff lawyer hours annually.

¶24 20,540 Management Lawyer-hours. 20,540 lawyer-hours are available from the 16.75 FTE management lawyers under current Policy 114. ... When these hours are added, OPD managers have only 168,290 FTE lawyer-hours per year for providing effective assistance of counsel in the new cases opened each year below the appellate level that [rose to 30,900] in FY 2012.

¶25 Further Reduction of Management Caseload Hours. [The AU report recommended,] *"The 'minimal' caseload statutory requirement for the Chief Defender, Contract Manager and Regional Deputy Defenders should be reduced or eliminated."* Taking into account the findings and commentary in the AU and ACLU reports, it might be prudent for the PDC to prohibit all OPD managers from carrying caseloads as recommended by the AU team. The PDC should at least limit the caseload hours of the managing attorneys and the rural RDPDs to somewhere in the area of half, mid-sized RDPDs to a third, and to a quarter or none for the RDPDs in the three large regions. Doing this would yield 13,514 management-hours using 1,500 hours as the base. OPD management would be left with 161,264 FTE lawyer-hours per year. Eliminating caseloads for the 17 managing attorneys would take away the 20,540 hours and leave OPD management with the 147,750 FTE staff lawyer-hours for client representation.

¶26 Greater limitations on caseloads carried by managers will most certainly increase the cost paid for contract attorneys and/or increase the stress on FTE lawyers who would shoulder the burden of more case assignments. Weighted caseloads, *i.e.*, caseloads after being weighted using the case weighting system, carried by managing attorneys in FY 2011 demonstrates a need for more FTE attorneys just for keeping the management caseload hours within OPD Policy 114 limits. Recent caseload data shows that some managers are increasing their caseloads to relieve the stress on the other lawyers. The "Caseload and Workload" section of the *OPD Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature* shows that many FTE staff lawyers exceeded the case weighted standard of 150 units last fiscal year[, now 125 hours per month]. The higher cost of contract hours drives ever growing FTE caseloads as OPD strives to stay within its budget. No flexibility remains in the FTE workforce for taking over manager caseloads. Absorbing a greater reduction in manager caseload hours will require even more FTE lawyers as the most cost efficient way to meet increasing demand.

¶27 Of course, contract attorneys provide representation in conflict cases. There are not enough FTE lawyer-hours to cover the other cases so representation is contracted to the extent OPD can and remain within the budget appropriated. In FY 2011, 7,276 or 26% of the 27,664

new cases were assigned to contract lawyers. Referring the overload to contract attorneys is a more costly option when the average hourly cost for an FTE lawyer has been calculated to be about \$72/hour and the average hourly cost for a contract lawyer is in the \$95/hour range. The simple explanation is that contract attorneys are paid \$60/hour (compared to \$125/hour for federal PD appointments) while the average cost per FTE attorney with benefits and insurance is about \$35/hour.

¶28 29,523 Investigator-hours. OPD has 19.5 FTE investigators employed. There are 223 workdays available to management because investigators do not have the 15 hour mandatory continuing education requirement the lawyers have. 1,514 hours gives OPD management 29,523 investigator-hours per year for assignment on the agency caseload. In 2009 the AU team concluded, "Investigative staff must be increased so that this prioritization [of felony cases receiving priority over misdemeanors] is unnecessary." No stretch of the imagination is needed for the realization that more FTE investigators are needed for covering appropriate misdemeanor cases as well as providing additional time for difficult, complex felony cases.

¶29 81,756 Support Staff-hours. 54 support staff personnel in Program 1, dispersed across the regions and the major crimes unit, provide OPD management with 81,756 FTE support staff-hours per year. Testimony before the PDC in the past has included pleas from the lawyers for more support staff help in the representation of their clients. The pleas have gone largely unheeded due to budget constraints. The sections on data collection and eligibility determination provide more explanation for justifying an increase in FTE support staff.

